IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 9, 2006 Session

CHARLES PELCZYNSKI, ET AL. v. SLATER REAL ESTATE COMPANY

Appeal from the Chancery Court for Hawkins County
No. 15987 Thomas R. Frierson, II, Chancellor

No. E2006-00971-COA-R3-CV - FILED JANUARY 26, 2007

This case involves a dispute over an earnest money deposit in a real estate transaction. The trial court awarded the prospective buyers, Charles Pelczynski and his wife, Barbara Pelczynski, a $5,000 judgment against Slater Real Estate Company, which amount represents the unrefunded portion of a $30,000 deposit. The court also awarded the Pelczynskis prejudgment interest and attorney's fees. Slater Realty appeals. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY, and SHARON G. LEE, JJ., joined.

Phillip L. Boyd, Rogersville, Tennessee, for the appellant, Slater Real Estate Company.

Thomas A. Peters, Kingsport, Tennessee, for the appellees, Charles Pelczynski and Barbara Pelczynski.

OPINION

I.

Wayne Slater was the owner of real property located at 219 Stewart Hills Drive in Rogersville. His son, Jeff Slater, resided on the property and paid the mortgage payments, taxes, and other expenses on the property. On June 14, 2004, the Pelczynskis, who were residents of Vermont,

entered into a "Purchase and Sale Agreement" ("the Agreement") with Jeff Slater[1] (sometimes referred to as "Mr. Slater") to purchase the Stewart Hills home for $125,000.

The Agreement was conditioned upon the Pelczynskis "obtaining a new loan." The Agreement was also conditioned upon the Pelczynskis selling or renting their home in Vermont. The Agreement also provided that "[a]fter a period of six months from the 'agreed upon date'[2] of the contract, said contract will then be reviewed by both buyer and seller either of whom shall have the option of terminating said contract should either so desire."

The Pelczynskis paid Slater Realty an earnest money deposit of $30,000. Slater Realty was to hold the money in escrow pending closing. Slater Realty was managed by Joanne Slater, the former wife of Wayne Slater and the mother of Jeff Slater. An addendum to the Agreement was signed by the Pelczynskis and Wayne Slater on June 17, 2004. The addendum provides that the Pelczynskis will forfeit $5,000 of the earnest money to the seller if, for any reason, they default on the contract. In the event of a default, the balance of the earnest money deposit – $25,000 – was to be returned to the Pelczynskis.

Mr. Pelczynski testified that, within five days of signing the Agreement, he applied for a loan in the amount of the contract price. He testified that he was surprised when he learned that he and his wife had only been approved for a $40,000 loan. He stated that he was unable to secure a loan for the remaining portion of the contract price and, at the same time, had been unable to sell his home in Vermont. Section 2(C)(2) of the Agreement addresses the parties' mutual obligations with respect to the Pelczynskis securing a loan:

> **Loan Obligations:** The Buyer agrees to (a) make application for the loan within five business days from the Binding Agreement Date, (b) immediately notify Seller's representative of having applied for the loan and the name of the lender, (c) pursue qualification for and approval of the loan diligently and in good faith, (d) pay any fees necessary to complete full loan processing and approval, and require lender to order credit report and appraisal within two days of application, (e) continually and immediately provide requested documentation to lender. Should Buyer fail to make timely application as agreed, Seller may make written demand for compliance. If Buyer does not furnish Seller written evidence of application within 5 days after such notice, Seller's obligation to sell

[1]Wayne Slater, the legal owner of the property, did not sign the June 14, 2004, document. However, he did sign some of the documents pertaining to this transaction. No issue was raised at trial or on appeal regarding the fact that Wayne Slater signed some of the documents while his son – who was apparently the beneficial owner of the property – signed others. We will treat Jeff Slater as the seller since he was the one to whom Slater Realty paid the $5,000 at issue in this case.

[2]The "agreed upon date" is June 14, 2004.

> is terminated and Buyer's Earnest Money is forfeited. Buyer may also apply for a loan with different terms and conditions and also close the transaction provided all other terms and conditions of this Agreement are fulfilled, and the new loan does not increase any costs charged to the Seller. Buyer shall be obligated to close this transaction if Buyer has the ability to obtain a loan with terms as described herein and/or any other loan for which Buyer has applied and been approved. Within twenty days from the date of Buyer's loan application, Buyer shall provide to Seller or Seller's representative a conditional commitment letter from the Buyer's lender providing reasonable assurance of Buyer's ability to obtain the financing contemplated by this Agreement. Said letter shall be in form and substance acceptable to Seller at Seller's reasonable discretion; however, a letter from the lender verifying that Buyer has available funds to close, credit acceptable to lender, and employment or income necessary to obtain said loan shall be deemed acceptable. Seller shall have the right to declare this Agreement null and void if said letter is not timely received, in which case Earnest Money shall be returned to Buyer.

(Bold type in original).

The Pelczynskis experienced substantial difficulty in selling their home in Vermont. It had been on the market for nearly a year and a half.

On September 16, 2004, the Pelczynskis entered into an "Offer to Purchase and Acceptance Contract" with Glenn L. Shields, and his wife, Sue Shields, to purchase a house located at 501 Maple Lane in Rogersville for $110,000. The Pelczynskis paid an earnest money deposit in the amount of $5,000 in connection with this contract. Mr. Pelczynski testified that, as far as he was concerned, the Agreement with Mr. Slater was still valid. He said that, despite the contract with the Shields, he still intended to purchase the Stewart Hills property if and when he sold his Vermont home.

On November 8, 2004, Jeff Slater wrote a letter to his mother at Slater Realty. He informed his mother of his opinion that the Pelczynskis had violated the terms of the Agreement. He directed her to tender him a check in the amount of $5,000 and return the remaining earnest money of $25,0000 to the Pelczynskis. The letter states, in pertinent part, as follows:

> I have decided to exercise my right as the seller as stated in the contract to terminate my obligation to sell because Mr. Pelezynski [sic] did not make application for the loan within five business days from the Binding Agreement Date and did not immediately notify my representative of having applied for the loan and supply the name of the lender. He also has never furnished me, the seller, written

> evidence of application. This is stated clearly in the Purchase and Sales Agreement and his failure to do so terminates my obligation to sell and Mr. Pelezynski [sic] forfeits his Earnest Money. You have my permission to release his $25,000 to him at this time and write a check to me for the remaining $5,000 which is the balance of the Earnest Money.

On November 10, 2004, in response to this letter, Mr. Pelczynski sent a communication via e-mail to Robert Viens, a real estate agent with Slater Realty. He informed Mr. Viens (1) that he had not defaulted on the Agreement, (2) that he had qualified for a loan of $40,000, and (3) that he considered the Agreement to be a binding obligation.

On November 30, 2004, Joanne Slater wrote a letter to the Pelczynskis in which she asserted that the Pelczynskis had breached the Agreement by failing to apply for a loan and by failing to notify the seller regarding the securing of a loan. Ms. Slater advised that, because of this breach, $5,000 of the earnest money deposit would be retained by her son. Then, on December 1, 2004, Ms. Slater sent a check to Jeff Slater in the amount of $5,000. On December 10, 2004, counsel for the Pelczynskis contacted Ms. Slater by letter, demanding the return of the full earnest money deposit of $30,000. The letter states that the Pelczynskis would be unable to close on the Stewart Hills property because they had been unable to sell or rent their Vermont home and had failed to obtain a loan in a sufficient amount.

On December 27, 2004, the Pelczynskis finally sold their home in Vermont. Then, on December 31, 2004, the Pelczynskis purchased the Maple Lane property from the Shields for the purchase price of $110,000. It was not until January 10, 2005, that Slater Realty tendered a check to the Pelczynskis in the amount of $25,000.

II.

After considering the testimony of the parties and the documentary evidence, as set forth in detail above, the trial court found in favor of the Pelczynskis and awarded them a judgment in the amount of the unrefunded earnest money deposit, *i.e.*, $5,000. The trial court's memorandum opinion contains the following pertinent findings:

> In the case at bar, the express contract provisions regarding the buyers' obligation to make application for a loan within five days from the date of the contract allow for the seller, in his discretion, to make written demand for compliance with this requirement. In the event that buyer does not furnish the seller written evidence of the application within five days of the seller's written notice, the seller's obligation to transfer the property is terminated and the buyer's earnest money is forfeited.

The evidence preponderates in favor of a finding that [the Pelczynskis] did make application for adequate financing to facilitate the purchase of the real property from Mr. Slater. The Pelczynskis, however, were unsuccessful in obtaining the full amount of financing necessary so as to consummate the purchase. Although this condition precedent to the contract (loan application) was satisfied, neither Mr. Wayne Slater, nor anyone on his behalf, provided written demand to [the Pelczynskis] for evidence of their loan application. Under the express provisions of the contract, [the Pelczynskis] as buyers maintained no contractual obligation to provide Mr. Slater with written evidence of an application unless requested. As such, [the Pelczynskis] were not in breach of this contractual obligation.

The [Pelczynskis] satisfied an additional condition precedent to the contract by obtaining a loan in the principal amount of at least 30% of $125,000.00. Although required by paragraph 2(C)(2) of the Purchase and Sales Agreement to do so, the Pelczynskis failed to provide Mr. Slater with a conditional commitment letter from the buyer's lender or a letter from the lender verifying that the [Pelczynskis] maintained available funds to close. Despite [the Pelczynskis] being obligated to close the transaction by maintaining the ability to obtain the loan upon terms as described in the contract, Mr. Slater as seller maintained the right to declare the agreement "null and void" if the letter was not timely received. Pursuant to the applicable contract provisions, in such instance, the earnest money was required to be returned to the [Pelczynskis] as buyer. Mr. Slater's letter of November 8, 2004 exercised his right to terminate his obligation to sell and in doing so obligated [Slater Realty] to return the entire amount of earnest money to [the Pelczynskis].

* * *

This Court concludes that the act of Mr. and Ms. Pelczynski contracting with Mr. and Ms. Shields for the purchase of other property in Hawkins County, Tennessee, did not demonstrate their total and unqualified refusal to perform under the contract with Mr. Slater. At no time did [the Pelczynskis] announce an intention to not to [sic] perform their obligations under the contract so as to permit Mr. Slater to treat the contract as breached, see Brady, *supra*. Instead, the [Pelczynskis] indicated their position that the contract remained a binding obligation. This Court concludes that [the Pelczynskis'] words and conduct during the term of the contract with Mr. Slater did not constitute an anticipatory breach of contract or a repudiation

> thereof. Mr. Slater therefore is not entitled to the $5,000.00 earnest money deposit. This Court awards a Judgment in favor of [the Pelczynskis] against [Slater Realty] in the amount of $5,000.00.

The court further awarded the Pelczynskis prejudgment interest of six percent, as well as attorney's fees in the amount of $3,628.75. The court also dismissed Slater Realty's counterclaim, which sought specific performance of the Agreement and damages.

III.

Slater Realty argues that the trial court erred in finding that it breached the Agreement with the Pelczynskis. The issue as stated by Slater Realty misses the thrust of the trial court's decision. Certainly, the trial court tacitly recognized that the payment of $5,000 to Jeff Slater was a breach of the Agreement. However, the linchpin of the trial court's judgment in this case is its holding that Jeff Slater terminated the Agreement at a time when the Pelczynskis were not in breach of their obligation to provide Jeff Slater with *written* documentation of the fact that they had applied for a bank loan within five days of the effective date of the Agreement. The critical issue for us is whether Jeff Slater's termination of the Agreement entitled him to $5,000 of the earnest money deposit. The trial court concluded that it did not and this is the real issue we must address in this case. As a further issue, Slater Realty challenges the trial court's award of prejudgment interest and attorney's fees. We will address each of these three issues in turn.

IV.

In this non-jury case, our standard of review is *de novo* upon the record of the proceedings below; however, the record comes to us with a presumption of correctness as to the trial court's factual determinations, a presumption we must honor unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); ***Wright v. City of Knoxville***, 898 S.W.2d 177, 181 (Tenn. 1995). Our review of questions of law is *de novo* with no presumption of correctness attaching to the trial court's conclusions of law. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996). The interpretation of a contract is a question of law. ***Wills & Wills, L.P. v. Gill***, 54 S.W.3d 283, 285 (Tenn. Ct. App. 2001).

The cardinal rule in contract interpretation requires a court to "ascertain the intention of the parties and to give effect to that intention consistent with legal principles." ***Id.*** at 286. If the contract is plain and unambiguous, its meaning is a question of law and it is incumbent upon the court to interpret it as written according to its plain terms. ***Bradson Mercantile, Inc. v. Crabtree***, 1 S.W.3d 648, 652 (Tenn. Ct. App. 1999). Language in a contract must be accorded its "usual, natural, and ordinary meaning." ***Id.*** Unambiguous language must be interpreted "as written rather than according to the unexpressed intention of one of the parties." ***Id.*** "Courts cannot make contracts for parties but can only enforce the contract which the parties themselves have made." ***Id.*** Consequently, a contract must be enforced as it is written absent fraud or mistake, even if the result

of doing so would appear harsh or unjust. ***Heyer-Jordan & Assoc., Inc. v. Jordan***, 801 S.W.2d 814, 821 (Tenn. Ct. App. 1990).

V.

Slater Realty's first issue pertaining to Jeff Slater's termination of the Agreement and the aftermath of that decision causes us to focus on Section 2(C)(2) of the Agreement. That section addresses the loan obligations of the Pelczynskis, as well as the rights of Jeff Slater with respect to the same subject. This section of the Agreement contains two sub-parts, under one of which the earnest money deposit is forfeited by the Pelczynskis while under the other sub-part the full amount of the earnest money deposit is to be returned to the Pelczynskis.

The first part of Section 2(C)(2) of the Agreement involves the obligation of the Pelczynskis to make an application for a loan within five business days of the date of the Agreement. It further provides for notification of the application to the seller. Under this first sub-part, if the Pelczynskis "fail to make timely application as agreed, Seller may make *written demand for compliance*." (Emphasis added). If the buyer receives such written demand and fails to give written evidence of the application within five days, then the contract provides that "Seller's obligation to sell is terminated and *Buyer's Earnest Money is forfeited*." (Emphasis added).

The second part of Section 2(C)(2) provides that the buyer has the option of applying for a new loan with different terms and conditions. It requires the buyer to notify the seller of such application through a conditional commitment letter from the lender within 20 days of applying for financing. Pursuant to the express terms of the contract, "Seller shall have the right to declare this Agreement null and void if said letter is not timely received, *in which case Earnest Money shall be returned to Buyer*." (Emphasis added).

In this case, the trial court first determined that the Pelczynskis were not in breach of the contractual provision requiring that they make application for adequate financing and provide notification of such application to Mr. Slater. The Pelczynskis, who had still not sold their house, were unable to obtain the full amount of the funds necessary to close the deal. Significantly, neither Jeff Slater nor Slater Realty ever made written demand on the Pelczynskis for proof of the fact that the latter had applied for a loan. As found by the court, "[u]nder the express provisions of the contract, [the Pelczynskis] as buyers maintained no contractual obligation to provide Mr. Slater with written evidence of an application *unless requested*." (Emphasis added). We agree with the court's interpretation of the contract in this respect.

Having determined that the Pelczynskis were not in breach of the Agreement, the trial court next found that Mr. Slater maintained the right to declare the Agreement "null and void" when the Pelczynskis failed to provide him with a conditional commitment letter from a lender verifying that the Pelczynskis had available funds to close on the property. Based upon the express terms of the Agreement, the court concluded that "Mr. Slater's letter of November 8, 2004 exercised his right to terminate his obligation to sell and in doing so obligated [Slater Realty] to return the entire amount

of earnest money to [the Pelczynskis]." Again, we agree with the court's interpretation of the contract.

Because Jeff Slater exercised his option to terminate his obligation to sell after the Pelczynskis failed to timely provide a conditional commitment letter, the provision with respect to the repayment of the full earnest money deposit to the Pelczynskis was triggered. Therefore, based upon the plain and unambiguous language of the Agreement, Slater Realty was obligated to return the full amount of the earnest money deposit to the Pelczynskis. Accordingly, the trial court's award to the Pelczynskis of $5,000, the remainder of their earnest money deposit, was consistent with the Agreement and the facts of this case and was entirely proper.

We will briefly address Slater Realty's argument that the Pelczynskis' action in contracting to buy the Maple Lane property from the Shields on September 16, 2004, revealed their intent not to be bound by the Agreement with Mr. Slater. Mr. Pelczynski testified to his belief that the Agreement with Mr. Slater was still valid. He further testified that he intended to purchase the property if he sold his Vermont home in advance of the contract expiration date of December 14, 2004. The evidence is clear, however, that the Pelczynskis did not sell their home in Vermont until December 27, 2004, and that they did not close on the purchase of the Shields' home until December 31, 2004.

The brief of Slater Realty suggests that the Pelczynskis "manipulated" the dates at issue and "deliberately delayed" closing on their Vermont home in order to suit their choice of purchasing the Shields' home over the Slater home. We agree with the trial court's conclusion that

> the act of Mr. and Ms. Pelczynski contracting with Mr. and Ms. Shields for the purchase of other property in Hawkins County, Tennessee, did not demonstrate their total and unqualified refusal to perform under the contract with Mr. Slater. At no time did [the Pelczynskis] announce an intention to not to [sic] perform their obligations under the contract so as to permit Mr. Slater to treat the contract as breached, ... Instead, the [Pelczynskis] indicated their position that the contract remained a binding obligation. This Court concludes that [the Pelczynskis'] words and conduct during the term of the contract with Mr. Slater did not constitute an anticipatory breach of contract or a repudiation thereof.

In order to constitute an anticipatory breach of contract or repudiation, Tennessee law requires that the words and conduct of a contracting party express "a total and unqualified refusal to perform the contract." ***Wright v. Wright***, 832 S.W.2d 542, 545 (Tenn. Ct. App. 1991); *see also* ***Brady v. Oliver***, 125 Tenn. 595, 147 S.W. 1135 (1911). It is clear that the Pelczynskis' action did not constitute such a complete refusal to carry out the Agreement with Mr. Slater.

VI.

Slater Realty also maintains that the trial court erred in awarding the Pelczynskis prejudgment interest of six percent on the judgment award of $5,000. Specifically, the real estate company points out that the earnest money deposit of $30,000 was held by Joanne Slater in a non-interest bearing account. In addition, it states that Mr. Pelczynski recognized he would not receive interest by way of his e-mail communication to Mr. Viens. We are not persuaded by Slater Realty's position.

The decision of whether to award prejudgment interest is within the sound discretion of the trial court and will not be disturbed by an appellate court absent a "manifest and palpable abuse of discretion." ***Myint v. Allstate Ins. Co.***, 970 S.W.2d 920, 927 (Tenn. 1998). "A trial court acts within its discretion when it applies the correct legal standard and reaches a decision that is not clearly unreasonable." ***Bogan v. Bogan***, 60 S.W.3d 721, 733 (Tenn. 2001).

In this case, the trial court determined that an award of prejudgment interest was necessary in order to "more fully compensate [the Pelczynskis] for the loss of the use of their funds." We cannot say that the decision to give the Pelczynskis six percent interest was "clearly unreasonable." *See* ***Bogan***, 60 S.W.3d at 733. Accordingly, we find no abuse of discretion in the court's award of prejudgment interest.

VII.

Finally, Slater Realty challenges the trial court's award of attorney's fees in the amount of $3,628.75 to the Pelczynskis. Specifically, the real estate company maintains that the court's judgment should be reversed, that its counterclaim should be reinstated, and that it should be awarded attorney's fees. Alternatively, Slater Realty submits that the Pelczynskis failed to specifically plead for such special damages. This issue is without merit as well.

Attorney's fees can only be awarded by the trial court if there is a contract or statute authorizing such an award. ***Guess v. Maury***, 726 S.W.2d 906, 923 (Tenn. Ct. App. 1986). Moreover, special damages such as attorney's fees must be specifically pleaded pursuant to Tenn. R. Civ. P. 9.07. *See* ***Cross v. McCurry***, 859 S.W.2d 349, 353 (Tenn. Ct. App. 1993).

In this case, the Pelczynskis specifically sought to recover their attorney's fees by way of the civil warrant they filed in general sessions court.[3] Moreover, the Agreement contains a provision for the recovery of attorney's fees, to wit: "In the event that any party hereto shall file suit for breach or enforcement of this Agreement . . ., the prevailing party shall be entitled to recover all costs of such enforcement, including reasonable attorney's fees." Accordingly, we find no abuse of discretion in the award of attorney's fees.

[3]This case originated in general sessions court.

VIII.

The judgment of the trial court is affirmed. This case is remanded to the trial court for enforcement of its judgment and for collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellant, Slater Real Estate Company.

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CHARLES D. SUSANO, JR., JUDGE